Supreme Court, U.S.
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No. 99-1037

IN THE

Supreme Court of the United States

RACHAMIM ANATIAN, *et al.*,

Petitioners,

v.

COUTTS BANK (SWITZERLAND) LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit Court of Appeals erred in affirming the dismissal of Petitioners' alleged federal securities and racketeering claims against Respondent pursuant to Rules 9(b) and 12(b) of the Federal Rules of Civil Procedure ("FRCP"), where

(i) the allegations of the dismissed pleading failed to raise a "strong inference" of scienter on the part of Respondent, as explicitly required by the Private Securities Litigation Reform Act of 1995 the ("PSLRA");

(ii) the dismissed pleading lacked any non-conclusory allegations of fraud which specified the alleged misstatements or omissions by Respondent with the particularity required by the PSLRA or FRCP 9(b); and

(iii) the alleged frauds which formed the basis of Petitioners' federal securities fraud and racketeering claims were more properly characterized as state law claims for breach of contract which should have been asserted in a parallel state court litigation.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Coutts Bank (Switzerland) Ltd., is wholly owned by Natwest PLC, a publicly held company.

TABLE OF CONTENTS

	Page
Restatement of Questions Presented for Review ..	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statutory Provisions Involved	1
Statement of the Case	2
A. Background	3
B. The Amended Complaint	6
C. The Dispositions Below	8
Reasons for Denying the Writ	11
A. The Amended Complaint Failed To State A Claim For Relief Under Rule 10b-5	11
1. The 10b-5 Claims Failed to Raise an Inference of Scienter on the Part of Coutts	11
2. The "Misrepresentations" Complained of Were Not Otherwise Made "In Connection With" a Purchase or Sale of Securities	14

Contents

Page

3. Petitioners Failed to Plead Their Rule 10b-5 Claims with the Requisite Particularity 15

B. The Amended Complaint Failed To State A Claim For Relief Under The RICO Statute 16

C. The District Court Did Not Abuse Its Discretion By Denying Petitioners Leave To Replead Their Federal Tort Claims 19

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Cases:

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) 16

Chemical Bank v. Arthur Andersen & Co., 726 F.2d 930 (2d Cir.), *cert. denied*, 469 U.S. 884 (1984) 14

Chill v. General Elec. Co., 101 F.3d 263 (2d Cir. 1996) 13

Citibank, N.A. v. K.H. Corp., 968 F.2d 1489 (2d Cir. 1992) 14, 15

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 14

F.D.I.C. v. Bathgate, 27 F.3d 850 (3d Cir. 1994) .. 19

Foman v. Davis, 371 U.S. 178 (1962) 19

GICC Capital Corp. v. Technology Fin. Group, 67 F.3d 463 (2d Cir. 1995) 18

Goren v. New Vision Int'l, Inc., 156 F.3d 721 (7th Cir. 1998) 19

H. J. Inc. v. Northwestern Bell Telephone, 492 U.S. 229 (1989) 18

Cited Authorities

Page

Hutsell v. Sayre, 5 F.3d 996 (6th Cir.), *cert. denied*, 510 U.S. 1119 (1993) 19

Jepson Inc. v. Makita Corp, 34 F.3d 1321 (7th Cir. 1994) 19

Keeney v. Kemper Nat'l. Ins. Cos., 1998 U.S. App. LEXIS 1226 (2d Cir. Jan. 27, 1998) 19

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) .. 18

Kramer v. Time Warner Inc., 937 F.2d 767 (2d Cir. 1991) 13

Laro, Inc., v. Chase Manhattan Bank, 866 F. Supp. 132 (S.D.N.Y.), *aff'd*, 60 F.3d 810 (2nd Cir. 1994) 13

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 2

Litton Indus. v. Lehman Bros. Kuhn Loeb, Inc., 967 F.2d 742 (2d Cir. 1992) 15

Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574 (1986) 12

Mills v. Polar Molecular Corp., 12 F.3d 1170 (2d Cir. 1993) 13, 18

Cited Authorities

	Page
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1954)	2
Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339 (2d Cir. 1994)	18
Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977)	13
Shields v. Cititrust Bancorp, Inc., 25 F.3d 1124 (2d Cir. 1994)	12, 13
Williams v. Little Rock Mun. Water Works, 21 F.3d 218 (8th Cir. 1994)	19
Statutes:	
15 U.S.C. § 78u-4	1
15 U.S.C. § 78u-4(b)(2)	1, 2, 12
15 U.S.C. § 78j	5
18 U.S.C. § 1961(4)	18
18 U.S.C. § 1962	18
18 U.S.C. § 1964(c)	18

Cited Authorities

Page

Rules:

FRCP 9(b) ..... i, 2, 15, 17, 19, 20

FRCP 12(b)(6) ..... i, 2

Supreme Court Rule 10 2

Other Authority:

17 C.F.R. § 240.10b-5 ..... 5, 7, 8, 11, 13, 14, 15, 16

STATUTORY PROVISIONS INVOLVED

Securities Exchange Act of 1934,
15 U.S.C. § 78u-4

* * *

(b) Requirements for securities fraud actions.

(1) *Misleading statements and omissions.* In any private action arising under the chapter in which the plaintiff alleges that the defendant —

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(2) *Required state of mind.* In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that

> the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

STATEMENT OF THE CASE

This Petition concerns an affirmance by the United States Court of Appeals for the Second Circuit of an order of the United States District Court for the Southern District of New York (Rakoff, J.) entered pursuant to FRCP 9(b) and 12(b)(6). In particular, this Petition concerns only that portion of the Second Circuit's affirmance which approved the District Court's dismissal of Petitioners' alleged federal securities law and racketeering claims against Respondent on the basis that Petitioners had failed to state a cognizable federal claim.

In support of their present request for a writ of certiorari to review that limited dismissal and affirmance, Petitioners have failed to present any "compelling reason" as to why the Circuit's ruling should be reversed, *see* Supreme Court Rule 10, or any substantive federal issue which would raise the Circuit's disposition "beyond the academic or episodic." *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1954); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is important to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing

conflict of opinion and authority between the circuit courts of appeal"). Petitioners cite no conflicts in the existing federal law regarding the dismissal of federal securities or racketeering claims, nor do they cite any error in the Circuit's formulations of federal tort principles as they relate to the dismissed claims. Indeed, Petitioners concede that "the Second Circuit issued what, on its face, appears to be a proper statement of law." Petition at 10.

At its heart, the Petition is nothing more than Petitioners' attempt to reargue the Circuit's disposition solely on the basis that the Circuit was purportedly "cavalier" in its review of the record before it. *Id.* As set forth herein, there was nothing in the slightest bit inappropriate, cavalier or "shocking" about the Second Circuit's thorough review and reasoned interpretation of the record. Further, Petitioners have not pointed to any "error" which would have had a material effect on the disposition ultimately reached by the Circuit. Thus, even if this Court were willing to entertain a reargument of the Circuit's disposition, dismissal of the complaint at issue would nevertheless remain entirely appropriate. The Petition should therefore be denied.

A. Background

This action involves a series of loans made in 1996 and 1997 by Respondent Coutts Bank (Switzerland) Ltd. f/k/a Coutts & Co AG ("Coutts"), a British private bank, to a consortium of seven limited liability companies under the control of Mr. Rachamim Anatian — Atik LLC, Charles Gundy LLC, Chesed LLC, Kaballa LLC, Keter LLC, Mamash LLC and Van Harper LLC (collectively, the

"LLCs"). Appendix at 11a.[1] These loans to the LLCs (the "Loans") were evidenced by a series of promissory notes signed by Mr. Anatian on behalf of the LLCs. (A 225-265). Repayment obligations under the notes were secured by collateral pledged by LLCs to Coutts as well as by Mr. Anatian's written, personal guaranties of all sums owing from the LLCs to Coutts. (A 196-207). The collateral pledged by the LLCs consisted almost entirely of Mr. Anatian's former stock holdings in an unrelated, publicly-traded company which Mr. Anatian had helped to found. Appendix at 4a.

As set forth in the written loan commitment letters governing the terms of the Loans to the LLCs (the "Loan Agreements"), each of the Loans was advanced for use in the LLCs' development of various businesses with which Mr. Anatian was involved. (A 166-194). One such business venture was a television shopping network known as Global Shopping Network, Inc. ("GSN"). When a scheduled initial public offering for GSN debt failed in the Spring of 1997, Mr. Anatian and the LLCs defaulted on their obligations to Coutts, leading to the instant dispute. Appendix at 4a.

In August 1997, Coutts initiated a summary collection proceeding against Mr. Anatian and the LLCs in the Supreme Court of the State of New York, County of New York (the "State Court Action"). By that action, Coutts sought to recover the balances of the Loans outstanding at the time of suit, as evidenced by the various promissory notes made by the LLCs and Mr. Anatian's personal guaranties. (A 145-164). This summary proceeding ultimately resulted in a judgment entered against the LLCs and Mr. Anatian in

1. Citations to "Appendix at ##" are to the pages of the Appendix attached to the Petition. Citations to "(A ##)" are to the pages of the Joint Appendix filed in the Second Circuit.

the full amount sought by Coutts. That judgment has now been affirmed by the Appellate Division, First Department of the New York State Supreme Court, and leave to appeal to the New York State Court of Appeals has been denied.

The action which is the subject of this Petition arose soon after Coutts commenced the State Court Action, when Mr. Anatian and the LLCs attempted to remove that action by filing a notice of its removal to the United States District Court for the Southern District of New York. The action was later remanded because Mr. Anatian was a New York State resident at the time of removal. (A 272-274). Only after that remand did Mr. Anatian and the LLCs attempt a *de facto* removal of the State Court Action by commencing the federal action at issue here (the "District Court Action").

The gravamen of Petitioners' complaint filed in the District Court Action was that Coutts had aliegedly breached certain oral loan commitments to Mr. Anatian and the LLCs and that, because of such alleged breaches, both he and his companies should be forgiven any obligation to repay the Loans. As a means of invoking the subject matter jurisdiction of the federal courts to hear that complaint (and avoid litigating such issues in the State Court Action), Petitioners alleged further that Coutts' failure to follow through with its alleged oral commitment for a loan of an unspecified amount constituted a violation of several federal regulatory statutes, including 15 U.S.C. § 78j, 17 C.F.R. § 240.10b-5 ("Rule 10b-5") and Sections 1962 (a), (c) and (d) of the Racketeer Influenced and Corrupt Organizations Act (the "RICO Statute").

B. The Amended Complaint

Petitioners' amended complaint against Coutts (the "Amended Complaint"), which was the pleading ultimately dismissed by the District Court, is included at pages A 82-A 137 of the Joint Appendix submitted to the Second Circuit. The pleading consists of 195 paragraphs of allegations and nine designated causes of action against Coutts. Its *ad damnum* clause requests compensatory and punitive damages from Coutts in excess of $1.5 billion. (A 134-136).

In the pleading, Petitioners admitted that they had accepted the Loans from Coutts pursuant to the Loan Agreements and further conceded that all Loans were secured by a written pledge of shares in GSN (the nascent cable company) and USA Detergents, Inc. ("USAD"), a publicly-traded company which Mr. Anatian had helped to found years earlier. (A 96-100). Notwithstanding the existence of integrated, written agreements and security arrangements, Petitioners alleged that certain unnamed officers of Coutts (referred to in the Amended Complaint as the "Coutts Representatives") entered into a contemporaneous *oral* agreement for an unsecured, non-recourse loan of an unspecified amount between $100 million and $150 million (the "Coutts Commitment"). Petitioners alleged further as follows:

> Coutts represented that the Coutts Commitment was definite and absolute and Coutts would not require further security for the Coutts Commitment.
>
> * * *

> Coutts made misrepresentations of fact in stating (i) that the Coutts Commitment was absolute and was not subject to the approval of any other entity or person, including but not limited to the London office of Coutts, and (ii) that the Coutts Representatives had the authority to make the Coutts Commitment and to release the funds thereunder, when, on information and belief, the Coutts Representatives did not have the authority to make the Coutts Commitment or to distribute funds thereunder and, on information and belief, no person or entity with authority was informed of the Coutts Commitment at the time it was made. (A 116, 119).

It was Coutts' failure to honor this "Coutts Commitment," Petitioners further alleged, that led to the collapse of their business ventures and corresponding inability to repay the Loans. Appendix at 3a-4a. In other words, as the District Court noted, the theory of the Amended Complaint was that Coutts had loaned Mr. Anatian and his companies millions of dollars as part of a "scheme" to take possession of stock in USAD and GSN (the "Stock") which was, at all times, worth substantially less than the Loans advanced. *Id.* at 14a.

Thus, as their Third and Fourth Claims in the District Court Action (the "10b-5 Claims"), Petitioners alleged that Coutts had intended to deprive them of the value of the Stock by advancing the Loans with the expectation that the LLCs would default and forfeit their collateral. This "fraud" in inducing the pledge of stock, Petitioners contended, constituted a violation of Rule 10b-5. (A 115-120). As their Seventh and Eighth Claims (the "Civil RICO Claims"), Petitioners alleged that these very same activities — the

failure to follow through with an alleged oral promise to advance an unspecified amount of credit — coupled with the use of interstate mails and wires constituted violations of the RICO Statute. (A 125-134).

C. The Dispositions Below

Coutts moved before the District Court to dismiss both the 10b-5 Claims and the Civil RICO Claims on the grounds that neither stated a claim upon which relief could be granted. Coutts also requested that the District Court abstain from hearing any of the state law claims alleged in the Amended Complaint in deference to the State Court Action. (A 139-40). Mr. Anatian and the LLCs opposed Coutts' motions.

The District Court heard extended oral argument of Coutts' dismissal motion in February 1998. (A copy of the transcript of the oral argument is at A 731-773.) The District Court thereafter dismissed both the 10b-5 Claims and the Civil RICO Claims with prejudice and without leave to replead and elected to abstain on the state law claims in deference to the State Court Action. (A 784). With respect to the alleged federal claims for relief, the District Court stated,

> These allegations [of the Amended Complaint] might more naturally be read to describe a fraud on the Coutts Bank than a fraud by it. But assuming *arguendo* that plaintiffs' allegations, read most favorable to them, make out State claims of fraud, contractual breach and the like against Coutts, they still fail to state a federal cause of action.

* * *

Here, the fraudulent misrepresentation on which plaintiffs chiefly rely – relating to the authority of Coutts Representatives to evade or override Coutts' internal loan requirements and to their failure to make good on their loan commitments — do not pertain to any securities involved in a purchase or sale, and cannot support a claim for securities fraud. While the alleged misrepresentations regarding the value of plaintiffs' stock pledged as collateral might in some circumstances state a securities fraud, here there is no non-conclusory allegation that the plaintiffs were somehow deceived as to the true value of their own stock. Rather, despite some broad language in the Complaints, the only well-pleaded victim of the alleged misrepresentations is, if anyone, the Coutts home office, and so there is no fraud on the plaintiffs.

Moreover, despite the inordinate length of these Amended Complaints, nowhere do they come close to meeting the particularity requirements of Rule 9(b) . . . Nor do they meet the particularity and intent requirements imposed by the Private Securities Reform Act of 1995. Given the length of the Complaints and the fact that plaintiffs have previously amended them, it cannot be reasonably supposed that plaintiffs could cure these deficiencies through further amendments.

Accordingly, the securities fraud claims must be dismissed with prejudice. The RICO claims,

> suffering from similar Rule 9(b) infirmities, must likewise be dismissed. Appendix at 13a-15a (citations omitted).

On appeal, the Second Circuit affirmed the District Court's dismissal of the alleged federal claims, stating as follows:

> Even if plaintiffs' allegations were true, the purported misrepresentations as to the authority of the Coutts representatives to loan money in excess of the bank's lending requirements and the failure to carry out the loan commitment do not pertain to the purchase or sale of a security. The district court properly rejected plaintiffs' attempt "to transform what are in essence breach of contract claims or breach of fiduciary duty claims only tangentially involving securities into securities fraud claims. "Plaintiffs' claim that Coutts deceived them by inflating the value of GSN stock in order to extend them more credit falls short of the mark. It is not sufficient to allege fraud in a transaction in which a security is a part. Therefore, we affirm the dismissal of the securities fraud claim.
>
> In addition, we find that Judge Rakoff properly dismissed both the securities fraud and RICO claims for failure to plead fraud with particularity. Alleging that Coutts Bank made a sizeable loan with knowledge that it could not be repaid does not give rise to an inference of fraud. Nor were the RICO predicate acts of mail and wire fraud alleged with sufficient particularity. Even if we were to find that the time and content of those

communications met the Rule 9(b) standard, plaintiffs' claim must be dismissed because they failed to allege how those statements were fraudulent. *Id.* at 6a-7a (citations omitted).

REASONS FOR DENYING THE WRIT

A. THE AMENDED COMPLAINT FAILED TO STATE A CLAIM FOR RELIEF UNDER RULE 10b-5

As their central critique of the affirmance below, Petitioners accuse the Second Circuit of having had a "complete lack of comprehension" of the "actual facts" underlying their Rule 10b-5 Claims. Petition at 17. As noted above, the Second Circuit can hardly be accused of a "complete lack of comprehension" of such claims, having correctly and cogently summarized them as pertaining to "the authority of the Coutts representatives to loan money in excess of the Bank's requirements and the failure to carry out the loan commitment." Appendix at 5a-6a. Even assuming *arguendo* that the Second Circuit had misperceived the gravamen of Petitioners' Rule 10b-5 Claims, as set forth herein Petitioners have cited no authority to support their contention that the "actual facts" that they now present to this Court could ever add up to an actionable violation of the federal securities laws.

1. The 10b-5 Claims Failed to Raise an Inference of Scienter on the Part of Coutts

Under the heightened pleading requirements adopted in the PSLRA, a putative securities law claimant must now, "with respect to each act or omission alleged to violate [the

anti-fraud provisions of the Securities Exchange Act of 1934], state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (1998) (emphasis added). There can be little doubt that, under this pleading standard, the Amended Complaint could not possibly support any inference that Coutts acted with *scienter* towards Mr. Anatian or his LLCs. The theory now advanced by the Petitioners is that unnamed "Coutts Representatives" "knew" that, in the absence of up at least $100 million in financing, GSN would be worthless and Petitioners would be unable to repay any Loans. Petition at 13. Notwithstanding this fact, Petitioners claim that the unnamed "Coutts Representatives" orally represented that Coutts would provide the subject financing not knowing whether or not the bank could ever follow through with such a commitment. Based on these allegations, Petitioners now seek an inference that, for some unstated reason, the "Coutts Representatives" gave Petitioners millions of dollars of credit without "informing [any] person or entity with authority" and without caring whether the LLCs would ever be able to repay the sums owed. As its *coup de grace*, these "Coutts Representatives" then secured the Loans with the very stock that it knew would be worthless once their "scheme" bore fruit.

As this Court stated in *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 596-97 (1986), if a defendant has no "rational economic motive to conspire, and if [its] conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of a conspiracy." Following this Court's lead, Courts in the Second Circuit have been loathe to draw inferences of fraudulent or conspiratorial intent which "defy logic" or otherwise defy "economic reason." *See, e.g., Shields v.*

Cititrust Bancorp, Inc., 25 F.3d 1124, 1127 (2d Cir. 1994) (dismissed 10b-5 claim was contrary to defendants' "economic self-interest"); *Laro, Inc., v. Chase Manhattan Bank*, 866 F. Supp. 132, 137 (S.D.N.Y.), *aff'd*, 60 F.3d 810 (2nd Cir. 1994).

In this case, despite requests by both the District Court and the Second Circuit, Petitioners have failed to offer any explanation as to why their theory of Coutts' behavior made "economic sense." Clearly, if Coutts wanted the Stock, it could have purchased it on the market for far less than the very dear price of $71 million. (Petitioners have conceded that, at almost all times, the amount loaned exceeded the market value of the stock. (A 97).) Nor is it reasonable to infer that Coutts risked millions of its own dollars to earn relatively insignificant interest and fees on the Loans. *See, e.g., Chill v. General Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996). The lack of any rational basis to infer that Coutts in fact advanced the Loans as a means of obtaining the Stock for less than fair consideration led both the District Court and the Second Circuit to conclude that, if Petitioners had any claims against Coutts regarding an alleged Coutts Commitment, such claims were for common law breach of contract, not securities fraud. Appendix at 6a, 13a-14a. In that regard, the courts have universally held that the failure to carry out a promise in a securities action is a breach of contract, not a fraud. *See, e.g., Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993) (failure to carry out promise in a securities transaction is normally a breach of contract and not a fraud); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 776 (2d Cir. 1991) (collecting cases; plaintiff cannot transform state law breach of contract or fiduciary duty claim into securities fraud claim); *cf. Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977) (breach of fiduciary

duty, without more, does not constitute violation of Rule 10b-5).

2. The "Misrepresentations" Complained of Were Not Otherwise Made "In Connection With" a Purchase or Sale of Securities

The second fatal defect in Petitioners' 10b-5 Claims, the Second Circuit noted, was the lack of any appreciable link between the LLCs' pledge of Stock to support secured loan obligations and Coutts' alleged misrepresentation regarding further unsecured loans. Appendix at 4a. With respect to any claim under Rule 10b-5, the misrepresentations complained of must be made "in connection with" the purchase or sale of securities. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). As Judge Friendly once explained, the purpose of the requirement "is to protect persons who are deceived in securities transactions – to make sure that buyers of securities get when they think they are getting." *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 943 (2d Cir.), *cert. denied*, 469 U.S. 884 (1984).

Even under Petitioners' newest theory presented in their Petition, the Amended Complaint failed to provide any nexus between the "misrepresentation" claimed — *i.e.*, the Coutts Commitment — and the "value" of the USAD and GSN securities at issue. Appendix at 6a. There were no allegations that the performance or non-performance of the Coutts Commitment had anything to do with the value of the stock in USAD, which was a wholly independent venture from GSN. Nor for that matter was there any claimed "loss causation" between the non-performance of the Coutts Commitment and any drop in the price of USAD shares. *See Citibank, N.A. v. K.H. Corp.*, 968 F.2d 1489, 1495

(2d Cir. 1992); *Litton Indus. v. Lehman Bros. Kuhn Loeb, Inc.*, 967 F.2d 742, 747 (2d Cir. 1992). As for the pledge of GSN stock, assuming *arguendo* that the Coutts Commitment might have had an impact on the *future* value of the company as a whole, Petitioners have failed to point to any authority in which a court has held such a link sufficient to support a Rule 10b-5 claim. Indeed, were such claims to be deemed sufficient for the purposes of stating a cause of action under Rule 10b-5, any lender's breach of a margin loan agreement would potentially be transformed into a federal tort claim.

3. Petitioners Failed to Plead Their Rule 10b-5 Claims with the Requisite Particularity

Finally, as both the Second Circuit and the District Court observed, the Rule 10b-5 Claims did not come close to meeting the particularity requirements of the PSLRA or FRCP 9(b) — *i.e.*, the identification of the fraudulent statement(s), the speaker(s), and the time and location of the statement(s). Appendix at 7a, 14a-15a.

In that regard, the Amended Complaint is devoid of any specifics of the "Coutts Commitment," such as interest terms, repayment terms, conditions precedent, terms of default, or even the amount of the Oral Commitment, which is described alternatively as "at least $100 million," "$150 million," "$100 million to $150 million" and "up to $150 million." (A 13, 30, 34, 345, 415, 750). Similarly defective was Petitioners' repeated use of phrases such as "Coutts," "Coutts Representatives," "various Coutts representatives," "Coutts representative who proposed and sanctioned this loan framework," and "Coutts, through its representatives," (*e.g.*, A 91-92, 94-95), all of which were clearly insufficient to provide Coutts with notice of the identities of the alleged

wrongdoers. Petitioners' conflicting allegations that the Coutts Commitment was made either in the first half of 1996 or during the Summer or Fall of 1996, (A 91, 95), were particularly damning. To the extent that the alleged misrepresentations were made *after* Petitioners had already pledged the Stock in June 1996, there was no "causation in fact" linking the allegedly fraudulent statement to the "sale" of the securities. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 154 (1972). Given the foregoing, the Second Circuit can hardly be gainsaid for refusing to permit Petitioners to advance their Rule 10b-5 Claims against Coutts.

B. THE AMENDED COMPLAINT FAILED TO STATE A CLAIM FOR RELIEF UNDER THE RICO STATUTE

The alleged basis for Petitioners' Civil RICO claims appeared in paragraph 165 of the Amended Complaint:

> Coutts entered into a scheme to defraud Plaintiffs, as set forth in detail at paragraphs 37, 48-50, 54, 67 and 70, above. In particular, in order to induce Plaintiffs to sign the Facility Agreements, to pledge stock to Coutts, and to pay the interest differential, Coutts represented to Plaintiffs it would make the loans, described and represented as the Coutts Commitment, to the seven LLCs; that the New York Office of Coutts had the authority to make such loans and to release the funds thereunder to Plaintiffs without the consent of any other entity or person, including, but not limited to the London office of Coutts; and that that the [GSN Stock] had a value far greater than its actual value.

(A 126). The Amended Complaint further contained "boilerplate" allegations that Coutts mailed account statements to Borrowers and made telephone calls to them to "confirm" the "frauds" (A 127); that the "foregoing" predicate acts constitute the required "continuity plus relationship" (A 128); and that Coutts may engage in other and further illicit "business practices" in the future. (A 128). As to these claims, the Second Circuit affirmed their dismissal "for the reasons set forth in the District Court," *i.e.*, for failure to state a claim for relief with the particularly required by FRCP 9(b). Appendix at 7a.

Petitioners' sole basis for challenging the affirmance is their feigned "shock" that the Circuit dismissed "claims under Section 1962(c)," which Petitioners now purport to have abandoned in their appeal to the Circuit. Petition at 10. As an initial matter, Petitioners' claimed "error" is without a basis in fact, as the record is devoid of *any* evidence of an abandonment of Petitioners' Section 1962(c) claim (the Eighth Claim in the Amended Complaint) or of a modification of Petitioners' notice of appeal. That notice clearly manifests Petitioners' intent to appeal "each and every part" of the District Court's dismissal order. (A 787).

Even assuming that Petitioners had in fact abandoned their Section 1962(c) claim, the "error" of the Second Circuit in dismissing that claim in no way affects the rationale underlying its dismissal of all Civil RICO Claims for failure to plead a federal claim for relief. As noted above, substantially all of the alleged "predicate acts" which form the basis of Petitioners' claims under both Sections 1962(a) and (c) relate to Coutts' performance of the alleged "Coutts Commitment." There is no dispute in any of the relevant case law, however, that "broken promises . . . cannot serve

as [RICO] predicate acts." *Mills*, 12 F.3d at 1176. Moreover, as for Petitioners' allegations that Coutts misrepresented "that the [Stock] had a value far greater than its actual value," (A 126), securities fraud is clearly no longer cognizable as a predicate act for purposes of a civil RICO claim. Section 1964(c), as amended in the PSLRA, expressly states that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962." *See* 18 U.S.C. § 1964(c) (1999).[2]

Finally, as was the case with the Rule 10b-5 Claims, both the District Court and the Second Circuit noted that the Civil Rico Claims fell well short of pleading allegations of

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2. Petitioners' Civil RICO Claims were hopelessly insufficient in other material respects. For example, the Amended Complaint summarily alleged that Coutts was an "enterprise" under 18 U.S.C. §§ 1961(4), 1962. (A 125). The mere allegation that Coutts engaged in "fraud" in the conducting of its operations did not, however, transform Coutts into an "enterprise." *See Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) (RICO violation insufficiently alleged where the enterprise "consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant"). Nor did the Amended Complaint establish a "pattern" of activity on the part of Coutts. In the end, the "frauds" alleged against Coutts, even if true, were part of a single transaction with a finite purpose and with no threat of continuity against Petitioners or anyone else. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (RICO statute requires at least two acts of racketeering); *H. J. Inc. v. Northwestern Bell Telephone*, 492 U.S. 229 (1989). Nor was there any basis for inferring that the predicate acts alleged by Petitioners, namely "mail" or "wire fraud," would continue unabated. *See GICC Capital Corp. v. Technology Fin. Group*, 67 F.3d 463, 466 (2d Cir. 1995) ("It defies logic to suggest that a threat of continued looting exists when, as plaintiff admits, there is nothing left to loot").

"mail" or "wire fraud" with the particularity required under FRCP 9(b). Appendix at 7a, 15a; *see Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 726 (7th Cir. 1998) (Rule 9(b) applies to RICO claims); *Jepson Inc. v. Makita Corp*, 34 F.3d 1321, 1327-28 (7th Cir. 1994).

C. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING PETITIONERS LEAVE TO REPLEAD THEIR FEDERAL TORT CLAIMS

The only other "error" addressed in the Petition is whether the District Court abused its discretion by denying Petitioners leave to replead their facially defective federal claims. In that regard, this Court has held that district courts have sound discretion to grant or deny leave to replead a dismissed complaint. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Whether or not leave to replead has been requested, the "futility" of any further amendments clearly constitutes a valid ground for district courts to deny leave to replead or amend. *Foman*, 371 U.S. at 1802; *Keeney v. Kemper Nat'l. Ins. Cos.*, 1998 U.S. App. LEXIS 1226, *6-7 (2d Cir. Jan. 27, 1998); *F.D.I.C. v. Bathgate*, 27 F.3d 850, 874-75 (3d Cir. 1994); *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 226 (8th Cir. 1994); *Hutsell v. Sayre*, 5 F.3d 996, 1006 (6th Cir.), *cert. denied*, 510 U.S. 1119 (1993). In denying leave to replead in this case, the District Court was not faced with a party's inadvertent omission of a few material allegations from its pleading or the inartful drafting of a claim. (Petitioners could hardly be accused of leaving anything out of their 53-page Amended Complaint.) Rather, as set forth herein, the hundreds of allegations in the Amended Complaint, even if true, simply did not give rise to claims for relief under the federal securities laws or the

RICO statute. The District Court specifically noted that the Amended Complaint, although "inordinately long," did not "come close" to meeting the exacting pleading requirements of the PSLRA or FRCP 9(b). Appendix at 14a. Nor would Petitioners ever "come close" to creating a federal fraud with improbable allegations of a breach of a "$100 million to $150 million" oral commitment to lend. As such, both the Second Circuit and the District Court were correct in concluding that it could not "be reasonably supposed" that leave to replead would cure the deficiencies in the Amended Complaint.

CONCLUSION

As set forth above, Petitioners have highlighted nothing in the Second Circuit's affirmance which represents in any way a departure from well-established legal principles regarding the dismissal of conclusory allegations of securities fraud and racketeering. Thus, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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